Mailed 4/3/00

IN THE MATTER OF:	*	
	*	
TERRY E. SHEERER,	*	
Claimant	*	
	*	
Against	*	Case No.: 1999-LHC-1631
	*	
	*	OWCP No.: 1-143378
BATH IRON WORKS CORPORATION,	*	
Employer/Self-Insurer	*	

APPEARANCES:

MARCIA J. CLEVELAND, Esq.
For the Claimant

STEPHEN HESSERT, Esq.
For the Employer/Self-Insurer

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on September 21, 1999, in Portland, Maine, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and EX for an exhibit offered by the Employer. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 13	Attorney Cleveland's letter confirming the briefing schedule	02/11/00
EX 17	Attorney Hessert's letter filing Employer's Brief	02/22/00
CX 14	Attorney Cleveland's letter filing Claimant's Brief	02/24/00

The record was closed on February 24, 2000 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On September 5, 1997 Claimant suffered an injury to his left knee at the employer's shipyard.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation on or about April 10, 1998 and the Employer filed a timely notice of controversion on September 9, 1997.

6. The parties attended an informal conference on March 30, 1999.

7. The applicable average weekly wage is in dispute.

8. The Employer has paid no benefits herein.

9. Claimant was unable to work from September 5, 1997 through October 30, 1997, because of his injury.

The unresolved issues in this proceeding are:

1. Whether Claimant's injury arose out of and in the course of his maritime employment or whether it occurred during so-called "horseplay."

2. Claimant's average weekly wage.

Summary of the Evidence

Terry E. Sheerer ("Claimant" herein),forty-five (45) years of age, with an eleventh grade formal education and an employment history of manual labor, began working on September 3, 1997 as a laborer at the Bath, Maine Shipyard of the Bath Iron Works Corporation(“Employer”), a maritime facility adjacent to the navigable waters of the Kennebec River where the Employer builds, repairs and overhauls vessels. He became a tank grinder on May 12, 1977. He became a lead worker on July 6, 1981 and then an assistant foreman on July 11, 1988. He then became a lead person on March 8, 1993 and a “preservation tech(nician)” on December 9, 1996, Claimant describing his work as that of a painter. He is still in that job classification at the present time. (EX ll; TR 19-21)

On September 4, 1998 Claimant was assigned to work on the third shift with hours from 10:30 p.m. to 7:00 a.m., an eight (8) hour work shift with thirty (30) minutes off for a lunch break between 3:00 a.m. and 3:30 a.m. On September 5, 1998, at about 3:15 a.m. Claimant was on his regular lunch break in the pipe shop, a building also known as the old boiler shop. He had been working as a painter in the pilot house of a vessel at the main shipyard and at about 3:00 a.m. he walked about fifty (50) yards from the vessel to the building where he proceeded to have his lunch. (TR 21-22)

Claimant and three co-workers set up a portable ping-pong table and proceeded to play a doubles’ match. As Claimant attempted to make a backhand return, his foot slipped and he fell to the ground, rupturing the patella tendon of his left knee. A co-worker went to summon a supervisor to the scene and Claimant was brought to the Mid-Coast Hospital in nearby Brunswick where the injury was diagnosed as follows (CX 10):

> Rupture, patella tendon, left knee;
> dislocation of patella, left knee,
> twisting injury playing ping pong.

Dr. John Van Arden, an orthopedic surgeon, was called in and Claimant underwent “repair of ruptured patella tendon left knee” and the postoperative diagnosis was “ruptured patella tendon, left knee.” Claimant “tolerated the procedure well and left the operating room in satisfactory condition.” (CX 10, CX 12)

Dr. Van Arden prescribed physical therapy, active ROM (range of motion) exercises and Claimant returned to work on light duty with restrictions and the Employer was able to provide appropriate work for him. On December 18, 1997 the doctor prescribed “an ultrasound of (Claimant’s) leg to rule out phlebitis.” On January 8, 1998 Dr. Van Arden reported that the “ultrasound ... shows no acute phlebitis” and scheduled a followup visit in two months, the

doctor imposing restrictions against “lifting more than 30 pounds, (against) kneeling, “and occasional climbing was permitted.” On March 9, 1998 Claimant advised the doctor that he couldn’t “climb stairs very well because his left knee feels uncomfortable.” The doctor, suspecting the existence of synovitis, continued his physical therapy and the work restrictions for another four months. That is the last report from Dr. Van Arden. (CX 11)

In this proceeding, Claimant seeks benefits for that closed period of time from September 5, 1997 through October 30, 1997 and the Employer has controverted Claimant’s entitlement to benefits because the injury did not arise out of and in the course and scope of his employment and occurred during so-called “horseplay” or recreational activities during a lunch break. (TR 12-15)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff’d**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that

"[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate**

Stevedoring Co., 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are

consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to Employer to rebut the presumption with substantial evidence which establishes that Claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard,

see Pietrunti v. Director, OWCP, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Sir Gean Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his ruptured patella tendon of the left knee, resulted from his September 5, 1997 accident at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm resulted from the September 5, 1997 incident. The sole issue is whether the injury arose in the course and scope of his employment.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes and I so find and conclude, that Claimant injured his left knee in a shipyard accident on September 5, 1997, that the injury was diagnosed as a ruptured patella tendon of the left knee (CX 10, CX 1, CX 2), that the Employer controverted Claimant's entitlement to benefits on or about September 9, 1997 (CX 4), and that Claimant timely filed for benefits once a dispute arose between the parties. (CX 3) In fact, the crucial issue is whether or not Claimant's injury arose out of and in the course of his maritime employment, an issue I shall now resolve.

There are six photographs of the area in question and these are in evidence as EX 15. Photograph 1 is the folded ping-pong table. Photo 2 is the area where the table was set up. Photo 3 is another view of the same area and "X" marks the spot where the table was set up. Photo 4 is a view of the area "to the side" and shows a pipe stand to hold a section of pipe, Claimant pointing out that on the floor is "speedy dry" or "kitty litter" usually used to cover oil spills. Photos 5 and 6 also are views of the same area.

Accordingly to Claimant, he and other third shift workers punch in to begin their work shift at 10:30 p.m. and punch out at 7 a.m., after their eight hour shift, also including a thirty minute lunch break during which time he remains "on the clock" but is not paid for his lunch break; that is a regularly scheduled break for third shift workers and, while he is free to leave the shipyard at 3 a.m. to go on his lunch break, he and the other employees remain at the shipyard because there is "nothing open at that time" in Bath. In the pipe shop building two portable ping pong tables are set up in that open area of the pipe shop, an area described by Claimant as about fifteen feet wide and thirty feet in length. That open area is in the production area of the pipe shop and the machines and other equipment used in the pipe shop are nearby. (TR 22-31)

According to Claimant, the ping pong tables were provided, at the request of a supervisor, and paid for by the Bath Iron Works Recreation Committee. A member of the Employer's management heads that committee, and there also are a number of union employees on that committee, Claimant remarking that such committee also plans company picnics, trips to different areas, flower shows and other recreational activities. The Committee "also provides recreational equipment for the employees." At the end of the lunch break the tables are folded and stored in the manner depicted in photo 1. (EX 15) Workers from different departments go to the pipe shop to have their lunch and to play ping pong if there are paddles available, Claimant remarking that there were four of five other workers in the area when he was injured. No work is done during that regularly scheduled third shift lunch break and no member of management comes to that area during the break to give a speech, for example. Moreover, no prizes or awards are received for winning a particular game. Claimant is a member of union local 6

and the record contains a one page release from local 6 dated May 30, 1997 and is entitled Benefits Alert (CX 16):

> The weather is warming up and we see more Local 5/6 members outside on your breaks playing basketball. As a reminder, any lost time due to injury will not be covered by workers compensation. This is BIW Workers Compensation Department policy which is supported by Maine court decisions. This comes under the horse play rule, which in short, reads any activity outside of normal work is not compensable. (TR 24-25, 32-37)

This case presents only one issue: whether Claimant's injury, which occurred during his lunch break, arises "out of and in the course of his employment". This issue relates to both the location at which the injury occurs, and the time. Of those two, the location is more important. **See Thielen v. National Steel & Shipbuilding Company**, 25 BRBS 79 (ALJ) (1991); **Kresgee v. Cargill, Inc.**, 12 BRBS 916 (1980), **rev'd on other grounds,** 14 BRBS 340 (9" Cir. 1981)

There is no dispute that Claimant's injury occurred at Bath Iron Works' main shipyard in Bath, and that it occurred in one of the production areas, namely the pipe shop. The only issue in dispute is whether the injury, because it occurred during a regularly scheduled break, is outside of the "course of employment". Again, there is no dispute that the injury occurred during his lunch break, that he had not punched out, and that he was not paid by the employer during his lunch break.

DISCUSSION

The Act provides that injuries sustained on the job are only compensable if they "arise out of and in the course of employment." 33 U.S.C. § 902(2). At issue in the instant case is whether an injury occurring while playing ping pong during an unpaid break is considered to "arise out of and in the course of employment" as required by the statute. While the Board has not decided this precise issue, the trend of its holdings in related cases strongly indicates that the Claimant's injury falls within coverage under the Longshore Act. Employer argues that the employee's activity of playing ping pong takes him outside the scope of coverage because he was on an unpaid break at the time and that such activity is not related to his employment. However, both prongs of this argument fail and each will be discussed in turn.

The favored view is that injuries occurring on the premises during a lunch hour or break period are within the course of employment. **See Larson's Workers Compensation Law** § 20 (1999). This is based on the fact that break periods have become a well-established and accepted incident of employment, the employer provides breaks and expects its employees to take them, and on-

premises breaks generally do not constitute such a departure from employment so that an intent to abandon the job may be inferred (unless the employee's conduct during the break is so unreasonable or unusual that it cannot be considered an incident of the employment). **Id.** State courts have consistently awarded compensation in cases involving injuries sustained during unpaid breaks taken on-premises[1]

According to **Larson, Workers Compensation Law** § 22 (1999), "[R]ecreational or social activities are within the course of employment when:

(1) They occur on the premises during a lunch or recreation period **as a regular incident of the employment....**" (emphasis added).

In the instant case, the Employer argues that the activity of playing ping pong is not related to his employment and therefore is outside the course of employment. This argument, however, fails for several reasons. Break periods, paid or unpaid, when taken on the employer's premises are considered within the course of employment for purposes of satisfying the statute. So, too, are injuries sustained during recreational activities that have become a regular incident of the employment. In the instant case, the Employer paid for and provided the ping pong table and equipment, and placed it in the break room. By doing so, the Employer impliedly acquiesced in this activity during break periods. Furthermore, since the Claimant works the third shift and took his break in the very early morning hours, he could not go anywhere off-premises for his breaks because nothing was open at that time. Thus, it may be inferred that the Employer expected and was aware that Claimant would use the ping pong table during breaks, since there was nowhere else to go during his break period. Therefore, the activity engaged in by Claimant was a regular incident of his employment.

This line of reasoning is in accord with the state case law on point. For example, in **McNamara v. Town of Hamden,** 176 Conn. 547, 298 A.2d 1161 (1979), an injury sustained during a game of ping pong on the employer's premises before the start of the work day was compensable despite the fact that the employees had purchased the equipment. **Id.** The court held that the activity was covered

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[1]**See, e.g. McDaniel v. Sage,** 366 N.E.2d 203, 549 So.2d 1238 (Ind. Ct. App. 1977); **Alabama Power Co. v. Mackey,** 594 So.2d 1238 (Ala. Ct. App. 1991), **cert. denied** (Feb. 28, 1992); **Grimes v. Mayfield,** 56 Ohio App. 3d 4, 564 N.E.2d 732 (1989). **See also, Osteen v. Greenville County Sch. Dist.,** 508 S.E. 2d 21 (S.C. 1998); **Weiss v. City of Milwaukee,** 208 Wis. 2d 95, 559 N.W.2d 588 (1997).

because it was on the premises, was reasonably incidental to the employment, and was both permitted and regulated by the employer.[2]

While the First Circuit has not dealt with this exact question, the Supreme Court, in **O'Leary v. Brown-Pacific-Maxon, Inc., et al.,** 340 U.S. 504, 71 S.Ct. 470 (1951) upheld a Deputy Commissioner's finding that an employee was entitled to benefits under the LHWCA. In **O'Leary**, the employee was using recreational facilities provided by his employer, a government contractor, when he drowned in an attempt to save another swimmer who signaled for help. In affirming the award of benefits, the Court stated, "[A]t the time of his drowning and death the deceased was using the recreational facilities sponsored and made available by the employer for the use of its employees and such participation by the deceased was an incident of his employment, and [that] his drowning and death arose out of and in the course of said employment...." This line of reasoning applies with equal force to the facts of the case at bar. Claimant was using ping pong equipment provided by his employer and thus the activity was an incident of his employment.

It should be noted at the outset that the "coming and going" rule does not apply to the facts of this case, as the claimant was on the employer's premises at the time of the injury. The Board has found claimants injured on their lunch or break periods are covered by the statute where the claimant's deviation from his employment was insubstantial.[3] This reasoning, taken to its logical conclusion, results in a finding that a Claimant injured on the employer's premises, during his shift, while on a break approved by the Employer and engaging in an activity provided by the employer, should fall squarely within the coverage of the Act.

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[2]**Accord, Appeal of Estate of Balamotis,** 141 N.H. 456, 685 A.2d 919 (1996), **reh'g denied** 9 Dec.20, 1996)(fatal heart attack suffered on the employer's premises during a lunch break was within the course and scope of employment and compensable); **Kloer v. Municipality of Las Vegas,** 106 N.M. 594, 746 P.2d 1126 (N.M. Ct. App. 1987)(Court cited employer's provision of equipment as factor in awarding compensation for fatal heart attack suffered during lunch-time basketball game).

[3]**See, Boyd v. Ceres Terminal,** 30 BRBS 218 (1997)(Claimant, injured while helping co-employee start car during his break covered); **Wilson v. Washington Metropolitan Area Transit Authority,** 16 BRBS 73 (1963)(Claimant injured on premises before shift began covered); **Kielczewski v. The Washington Post Co.,** 8 BRBS 428 (1978)(Claimant on premises after shift ended covered by Act).

Based on the foregoing, Claimant’s injury sustained while playing ping-pong on the Employer’s premises, during an approved break period, and using equipment supplied by the Employer, is compensable under the Act.

The case of **Durrah v. Washington Metropolitan Area Transit Authority**, 760 F2d. 322, 17 BRBS 95 (CRT) (D.C. Cir 1985) presents facts that are virtually identical to those presented by this case. In **Durrah**, the claimant was employed as a guard by the Washington Metropolitan Transit Authority as a security guard. He was on duty during the midnight to 8 a.m. shift, and was assigned to a guard post where he was required to monitor traffic entering and leaving the depot. At approximately 4 a.m., **Durrah** left his guard house to buy a soda at a vending machine in the employee's lounge which was located in the depot and maintained by his employer. As he returned to his post, he fell on the stairs, injuring his knee. The employer claimed that he was not authorized to leave his post and therefore the injury had not arisen in the course of his employment.

> The Court of Appeals rejected the employer’s argument and held: "There is no dispute that this injury would be one 'arising out of and in the course of employment' 33 U.S.C. 902(2) if **Durrah** had obtained both permission and a substitute to cover post one before going to the employee's lounge. We hold that his fall was securely within the time and space boundaries of his employment." **Durrah** 17 BRBS at 98(CRT)

The Court went on to note that the employer had not provided clear evidence that **Durrah** was forbidden to leave his guardhouse. In the absence of clear evidence on that point, the presumption in §20(a) required a finding that the injury came within the provisions of the Act.

Claimant’s case is almost indistinguishable on its facts from the **Durrah** case. The only difference is that here, there is no contention that Claimant was acting in an unauthorized way at the time of his injury. It is undisputed that he was playing ping-pong and his Employer authorized ping-pong playing. Indeed, the Employer provided the ping-pong table that he was using. There is also no question that he was playing ping-pong on a regularly scheduled break when he was authorized to leave the shipyard if he wanted.

Other cases involving employees injured while coming or going from work could also support a finding that the Claimant's injury in this case arose in the course of his employment. For example, in **Preskey v. Cargill**, the Ninth Circuit found an injury that occurred before the claimant punched in at work was covered by the Act. **Preskey v. Cargill**, 14 BRBS 340 (9th Cir. 1981).

Employer’s counsel makes a valiant attempt to defend the Employer’s position and relies on one case, **Vitola v. Navy Resale**

and Support Services Office, 26 BRBS 88 (1992). However, that case is clearly distinguishable because that related to an after-hours softball game, off the company property. The case at bar happened on company property, while Claimant was still "on-the-clock," although not being paid for the lunch break. That on-site break actually serves the Employer's interests because the alternative is for the employees to leave the production area, go out to their automobiles or drive to downtown Bath and perhaps imbibe something stronger than a soft drink, thereby endangering the general public, their co-workers or themselves upon their return to work.

Another reason to find a work-related injury herein is because, apparently, the claim is not subject to jurisdiction under the State of Maine Workers' Compensation Act. (CX 16; TR 14)

Accordingly, in view of the foregoing, I find and conclude that Claimant's injury arose out of and in the course of his employment and within the scope of his maritime employment and that the Employer is responsible for that injury.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible**

Offshore, Inc., 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he could not not return to work as a painter from September 5, 1997 through October 30, 1997. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability during that closed period of time.

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during **substantially** the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and Sons**, 12 BRBS 148, 156 and 157 (1979). A substantial part of the

year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. **Hole v. Miami Shipyards Corp.**, 12 BRBS 38 (1980), **rev'd and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. **See O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). **See also Brien v. Precision Valve/Bayley Marine**, 23 BRBS 207 (1990); **Klubnikin v. Crescent Wharf & Warehouse Co.**, 16 BRBS 183 (1984). Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. **See Waters v. Farmer's Export Co.**, 14 BRBS 102 (1981), **aff'd per curiam**, 710 F.2d 836 (5th Cir. 1983); **Duncan v. Washington Metropolitan Area Transit Authority**, 24 BRBS 133, 136 (1990); **Gilliam v. Addison Crane Co.**, 21 BRBS 91 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," **Duncan**, **supra**, but 33 weeks is not a substantial part of the previous year. **Lozupone**, **supra**. Claimant worked for the Employer for the 52 weeks prior to September 5, 1997 and his wage statement is in evidence as CX 9. Therefore Section 10(a) is inapplicable. The second method for computing average weekly wage, found in Section 10(b), cannot be applied because of the paucity of evidence as to the wages earned by a comparable employee. **Cf. Newpark Shipbuilding & Repair, Inc. v. Roundtree**, 698 F.2d 743 (5th Cir. 1983), **rev'g on other grounds** 13 BRBS 862 (1981), **rehearing granted en banc**, 706 F.2d 502 (5th Cir. 1983), **petition for review dismissed**, 723 F.2d 399 (5th Cir. 1984), **cert. denied**, 469 U.S. 818, 105 S.Ct. 88 (1984).

Claimant worked for the Employer for 37 weeks prior to his September 5, 1997 injury. Thus, Section 10(a) is applicable herein. During those weeks he earned $33,236.59 (CX 9), thereby producing an average weekly wage of $898.29, pursuant to the formula required by that section.

Accordingly, I find and conclude that Claimant's average weekly wage may reasonably be set at $898.29 as of September 5, 1997.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a

disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section (d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). See also 20 C.F.R. § 702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal, supra**.

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7 (d). Claimant advised the Employer of his work-related injury on

the same day and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, the Employer is responsible for the reasonable, appropriate and necessary medical care and treatment in the diagnosis, evaluation and treatment of his ruptured patella tendon of the left knee, including payment of the medical bills of the Mid-Coast Hospital, Dr. Van Arden and any other expenses relating thereto, all of which expenses are subject to the provisions of Section 7 of the Act.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant's entitlement to benefits.

(CX 4; EX 3). **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney shall file a fee application, concerning services rendered and costs incurred in representing Claimant after March 30, 1999, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition shall be filed within thirty (30) days of receipt of this decision and Employer's counsel shall have ten (10) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer, as a self-insurer, shall pay to the Claimant compensation for his temporary total disability from September 5, 1997 through October 30, 1997, based upon an average weekly wage of $898.29, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

3. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, including payment of the unpaid medical expenses discussed above subject to the provisions of Section 7 of the Act.

4. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on March 30, 1999.

DAVID W. DI NARDI
Administrative Law Judge

Dated: April 3, 2000
Boston, Massachusetts
DWD:dr